

**REMARKS/ARGUMENT**

This response is submitted under 37 C.F.R. § 1.111 to the Office Action of September 10, 2008.

Claims 2-11 and 14-19 are pending in the application, with claims 1, 12, and 13 having been canceled, claims 2-11, 14, and 15 having been currently amended, and new claims 16-19 having been added.

The Examiner has objected to claims 1-11 “because of the following informalities: Claims should begin with an article. Independent claims should be begin with –A–. Dependent claims should start with –The–.”

It is respectfully submitted that the current claims, as amended, employ the appropriate initial articles. Accordingly, it is requested that the objection to claims 1-11 be withdrawn.

**1. Rejection under 35 U.S.C. § 112, Second Paragraph**

Claims 1, 3, 4, 6, and 7 have been rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter that Applicants regards as the invention. Specifically, according to the Examiner:

A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. . . . In the present instance, Claims 1, 4, and 6, are drawn to medicaments, which include the limitation “in particular.” This phrase

**Application No. 10/532,033**  
**Amdt. dated December 9, 2008**  
**Response to the Office Action of September 10, 2008**

is narrower than the statement of possible medicaments. Claim 3 recites the broad recitation  $R^2, R^3, R^4, R^5$  are  $C_1-C_6$  alkyl and  $R^6$  is aryl, and the claim also recites  $R^2, R^3, R^4, R^5$ , and  $R^6$  are preferably ethyl, methyl, methyl, methyl (linked to  $C_5$  of benzyl ring M) and benzyl, respectively which is the narrower statement of the range/limitation. Claim 7 recites the broad recitation an antifungal medicament characterized by the mass ratio  $0.02 \leq I/II \leq 50$ , and the claim also recites an antifungal medicament characterized by the preferable mass ratio  $0.1 \leq I/II \leq 20$ , or more preferably  $0.5 \leq I/II \leq 10$  which is the narrower statement of the range/limitation.

The claims have been amended to eliminate the language referring to the preferred species pointed out by the Examiner.

**2. Rejection under 35 U.S.C. § 112, Second Paragraph**

Claim 7, 8, 9, and 11 have been rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter that the Applicants regards as the invention. Specifically, according to the Examiner:

Claim 7 recites the limitation of “the mass ratio (I/II).” Claims 8, 9, and 11 recite the limitation “compound II” in the claims. There is insufficient antecedent basis for this limitation in the claim because the claims upon which they depend (Claims 1 or 4) are not limited by compound II.

**Application No. 10/532,033**  
**Amdt. dated December 9, 2008**  
**Response to the Office Action of September 10, 2008**

Claims 7-9 and 11 have now been amended to depend, directly or indirectly, upon claim 5, which provides the proper antecedent basis for antifungal compound (II).

**3. Rejection under 35 U.S.C. § 112, Second Paragraph**

Claims 6 and 13 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter that the Applicants regard as the invention. Specifically, according to the Examiner:

Claims 6 and 13 are drawn to a medicament (Claim 6) or a use of said medicament (Claim 13) wherein compound I is combined with compound II.

Claims 6 and 13 limit compound II to a list of antifungal families, and then specific species of compound II are listed. It is unclear whether the claim limits compound II to one or more specific species (i.e. bifonazole or flucytosine), or one or more families (i.e. azoles or nucleoside analogues). Therefore, the rejected claims are indefinite.

Claim 6 has been amended to be directed to the families, rather than to the species. Claim 13 has been canceled.

**4. Rejection under 35 U.S.C. § 112, Second Paragraph**

Claims 12-15 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter that the Applicants regard as the invention. Specifically, according to the Examiner:

**Application No. 10/532,033**  
**Amdt. dated December 9, 2008**  
**Response to the Office Action of September 10, 2008**

Claims 12-15 provide for the use of a medicament, but, since the claim does not set forth any steps involved in the method/process, it is unclear what method/process applicant is intending to encompass. A claim is indefinite where it merely recites a use without any active, positive steps delimiting how this use is actually practiced.

Claims 14 and 15 have been amended to be directed to "A process for the manufacture of an antifungal medicament comprising including in the manufacture the step of adding at least one compound of formula (I)," etc. Claims 12 and 13 have been canceled.

Accordingly, it is requested that the rejections of claims 1, 3, 4, 6-9, and 11-15 under 35 U.S.C. § 112, second paragraph, be withdrawn.

**5. Rejection under 35 U.S.C. § 101**

Claims 12-15 have been rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter. Specifically, according to the Examiner:

Claims 12-15 is [sic] rejected under 35 U.S.C. 101 because the claimed recitation of a use, without setting forth any steps involved in the process, results in an improper definition of a process, i.e., results in a claim which is not a proper process claim under 35 U.S.C. 101.

Claims 14 and 15 have been amended to be directed to "A process for the manufacture of an antifungal medicament comprising including in the manufacture the step of adding at least one compound of formula (I)," etc. Claims 12 and 13 have been canceled.

**Application No. 10/532,033**  
**Amdt. dated December 9, 2008**  
**Response to the Office Action of September 10, 2008**

Accordingly, it is requested that the rejection of claims 12-15 under 35 U.S.C. § 101 be withdrawn.

**6. Rejection under 35 U.S.C. § 102(b)**

Claims 1-4 have been rejected under 35 U.S.C. § 102(b) as being anticipated by Charles et al. (WO 00/46184). For convenience, the U.S. equivalent of WO 00/46184 -- U.S. Patent No. 6,893,650 -- has been employed in preparing this response.

The Applicants have incorporated WO 00/46184 by reference into the present specification. It is stated in paragraphs [0004] and [0005] of U.S. Published Application No. 2006/0052459 (the published application of the present application):

[0004] International application WO-00/46184 describes one or more

N<sub>2</sub>-phenylamidine derivatives. Such compounds are used in the agricultural field as antifungal agents.

[0005] The applicant has demonstrated quite unexpectedly that N<sub>2</sub>-phenylamidine derivatives also constituted antifungal compounds of choice, both in human being and in animal.

The Applicants, thus, do not deny that compositions disclosed in that publication can be used in the practice of the present invention.

It is noted that U.S. Patent No. 6,893,650 to Charles et al. discloses in column 8, lines 63-65, that "the compounds of the invention can be used to treat fungal infestations in domestic and farm animals."

**Application No. 10/532,033**  
**Amdt. dated December 9, 2008**  
**Response to the Office Action of September 10, 2008**

New claim 16, which is directed to a method for treating *Candida albicans* or *Aspergillus fumigatus* infections in humans or animals has been substituted for former claim 1, which has been canceled.

There is no disclosure or suggestion in Charles et al. that the compounds disclosed therein could be used for treating fungal infections in humans, nor is there any disclosure of the use of such compounds for treating *Candida albicans* or *Aspergillus fumigatus* infections in either humans or animals. Other than the single sentence referred to above, the Charles et al. disclosure is concerned only with the use of the compounds to combat fungi infestations in plants. Further, the only fungi specifically mentioned are *Phytophthora infestans*, *Plasmopara viticola*, *Erysiphe graminis* f. sp. *tritici*, and *Leptosphaeria nodorum*.

Further, it is noted that this rejection has not been applied to claims 14 and 15. The features of claims 14 and 15 have now been incorporated into new claim 16, upon which all the currently pending claims are dependent, either directly or indirectly.

Accordingly, it is requested that the rejection of claims 1-4 under 35 U.S.C. § 102(b) as being anticipated by Charles et al. be withdrawn.

**7. Rejection under 35 U.S.C. § 103(a)**

Claims 1 and 5-11 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Charles et al. in view of Bennett (GOODMAN & GILLMAN, THE PHARMACEUTICAL BASIS OF THERAPEUTICS (10th ed. 2001)).

**Application No. 10/532,033**  
**Amdt. dated December 9, 2008**  
**Response to the Office Action of September 10, 2008**

The defects of the Charles et al. reference have been discussed above. It is noted that this rejection has not been applied to claims 14 and 15. The features of claims 14 and 15 have now been incorporated into new claim 16, upon which all the currently pending claims are dependent, either directly or indirectly.

Accordingly, it is requested that the rejection of claims 1 and 5-11 under 35 U.S.C. § 103(a) as being unpatentable over Charles et al. in view of Bennett be withdrawn.

**8. Provisional Obviousness-Type Double Patenting Rejection**

Claim 5 has been provisionally rejected on the ground of non-statutory obviousness-type double patenting as being unpatentable over claim 1 of co-pending Application No. 10/589,011 and claim 1 of co-pending Application No. 10/489,151.

As pointed out in the Office Action, a timely filed terminal disclaimer in compliance with 37 C.F.R. § 1.321(c) may be used to overcome an actual or provisional rejection based on a non-statutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application.

The present application and U.S. Patent Application Nos. 10/489,151 and 10/589,011 are commonly owned by BAYER CROPSCIENCE S.A., 16 Jean-Marie Leclair, F-69009, Lyon, France.

A Terminal Disclaimer Under 37 C.F.R. § 1.321(b) and (c) is filed herewith disclaiming, with the customary exceptions, the terminal part of the statutory term of any patent granted on the instant application that would extend beyond the expiration date(s) of the full statutory term(s) of any patent(s) issued on U.S. Patent Application Nos. 10/489,151 and 10/589,011.

**Application No. 10/532,033**  
**Amdt. dated December 9, 2008**  
**Response to the Office Action of September 10, 2008**

Accordingly, it is requested that the provisional rejection of claim 5 on the ground of non-statutory obviousness-type double patenting as being unpatentable over claim 1 of co-pending Application No. 10/589,011 and claim 1 of co-pending Application No. 10/489,151 be withdrawn.

In view of the foregoing, it is submitted that this application is now in condition for allowance, and an early Office Action to that end is earnestly solicited.

Respectfully submitted,



---

Paul Grandinetti  
Reg. No. 30,754  
OSTROLENK, FABER, GERB & SOFFEN, LLP  
1180 Avenue of the Americas  
New York, New York 10036-8403  
Telephone (202) 457-7785